



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: NOVEMBER 10, 2022

IN THE MATTER OF:

Appeal Board No. 624675

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective March 9, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to March 9, 2022 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held telephone conference hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed June 21, 2022 (), the Administrative Law Judge sustained the initial determination.

The claimant appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statement submitted on behalf of the employer.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant worked full time from July 2011 through January 30, 2022 as a city firefighter and code enforcement officer. On January 28, 2022, the claimant got into a locker room fight with a retired firefighter while they were playing on opposing teams in a hockey game at the city's recreation center. The police were called. On January 31, the Fire Chief suspended the claimant with pay pending investigation. In a suspension letter dated that day, the Fire Chief advised the claimant that the suspension was

not disciplinary. The letter further stated that the claimant was required to surrender all fire station keys in his possession, and he was not to enter city property during the period of his suspension without the Chief's prior permission. The letter did not state what might happen if the claimant violated these terms.

Later on January 31, the claimant went to the recreation center to find out whether there was video of the incident, as he believed video would help him prove that he was not at fault. The recreation center is owned and managed by the city.

The Fire Chief learned from a third party that the claimant was at the recreation center. The next day, the Fire Chief sent the claimant a text message saying, "I understand that you were at the Rink yesterday and just to reiterate, from the document received yesterday, you need advanced permission from me to be on City property." The claimant sent a reply text message saying, "Thought it meant fire and city buildings. Went to see if there were cameras to affirm my account of events. Am I allowed at the rink going forward?" The claimant sent a second message saying that in a prior situation, "I was allowed at the rink just not the fire stations or city building." In a third message, he asked, "Can I take my kids sledding ... at the park?" The Chief replied to this third message, saying "Yes." The claimant also sent a fourth message saying, "Chief I am requesting permission to attend my game tonight at the Ice rink it is at 7:45."

Based on his entry onto city property on January 31 when he went to the recreation center without permission, the employer deemed the claimant insubordinate and separated him from service on March 8, 2022.

OPINION: The credible evidence establishes that the employer separated the claimant from service as a firefighter and code enforcement officer because the employer determined that he was insubordinate when he visited the city recreation center after he had been instructed not to enter city property without prior permission. However, the evidence shows that the claimant did not understand that this restriction encompassed the recreation center. Once the Fire Chief contacted him about this infraction, the claimant wrote back and explained that, based on a prior situation, he believed he was barred only from being present at the city building and fire stations. He explained why he had gone to the recreation center, and he complied with the Fire Chief's order going forward, requesting permission to take his children to the park and to

return to the recreation center for a hockey game. The claimant's conduct in this regard supports the conclusion that he did not intend to violate the Fire Chief's instructions to him. Further, the claimant's suspension letter did not put the claimant on sufficient notice that violating the Chief's directive would jeopardize his job. Under these circumstances, we conclude that the claimant was not insubordinate, and his actions do not rise to the level of misconduct. Accordingly, we conclude that the claimant separated from employment under circumstances that are non-disqualifying, and the claimant is allowed benefits.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determination, disqualifying the claimant from receiving benefits, effective March 9, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to March 9, 2022 cannot be used toward the establishment of a claim for benefits, is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

RANDALL T. DOUGLAS, MEMBER